No. 83-1298

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

OIL, CHEMICAL, AND ATOMIC WORKERS INTERNATIONAL UNION AND ITS LOCAL 4-23,
Petitioners,
v.
RAYMOND J. DONOVAN, SECRETARY OF LABOR,
and
AMERICAN PETROFINA CO. OF TEXAS,
Respondents.

REPLY BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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TABLE OF AUTHORITIES

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The Secretary of Labor acknowledges that "roughly nine out of every ten [OSHRC] cases are settled prior to a hearing." Br. for Fed. Resp. at 11. That being so, it is apparent that the question presented here as to the respective roles of the Secretary and the Commission in the settlement process is central to the proper functioning of the Occupational Safety and Health Act. But notwithstanding the intrinsic importance of the issue and the desirability of a definitive ruling by this Court that would end the unseemly dispute between the Secretary and the Commission, the Secretary strains to show that the holding below is so self-evidently correct as to be unworthy of this Court's consideration; that effort is unavailing.

1. Remarkably the Secretary claims that "there is no conflict in reasoning between the decision below and the decision of the other courts of appeals." Br. for Fed. Resp. at 5. That claim is belied by the Secretary's own admission that the court below "based [its] decision" not on its agreement with the Secretary's contentions but on what the Secretary terms "a commendable desire to avoid 'administrative chaos' and a circuit conflict." *Id.* Indeed, the court of appeals here made it plain that if this had been a matter of first impression the court would have rejected the Secretary's position and upheld the Commission's rule requiring review of settlements. *See* Pet. App. 19a-23a.

The Secretary's felt necessity to pretend that the reasoning below accords with the reasoning of other courts reveals the emptiness of his claim that the question presented does not warrant consideration by this Court.

2. The Secretary's efforts to defend his position on the merits are equally flawed.

(a) The Commission's rule at issue—Rule 100 of OSHRC's rules of procedure which expressly requires Commission review of settlement agreements—was promulgated by the Commission pursuant to its express statutory authorization "to make such rules as are necessary for the orderly transaction of its proceedings." 29 U.S.C. § 661(f). The relevant inquiry, therefore, is whether the Commission exceeded the scope of its rulemaking authority in promulgating Rule 100. *Cf. Hanna v. Plumer*, 380 U.S. 460 (1965).

The Secretary attempts to sidestep that inquiry by arguing that the Commission "is not a policymaking agency" and that "[i]ts interpretations of the Act are therefore 'not entitled to any special deference from the courts.'" Br. for Fed. Resp. at 5 n.2. Indeed, the Secretary goes so far as to suggest that on questions concerning the Commission's rulemaking authority it is the

Secretary, not the Commission, who is entitled to deference. *Id.*

The courts of appeals "have differed," *Marshall v. Western Electric Inc.*, 565 F.2d 240, 244 (2d Cir. 1977), as to who is entitled to deference where the Secretary and the Commission are in disagreement on the meaning of a *substantive* provision of the Act or of a *substantive* regulation promulgated by the Secretary; even in that realm some appellate courts have held, contrary to the Secretary's argument, that the "Commission was designed to have a policy role," *Brennan v. Giles & Cotting, Inc.*, 504 F.2d 1255, 1262 (4th Cir. 1974), and that "[t]he Court[s] should therefore show great deference to the Commission's interpretation of the Act," *Dunlop v. Rockwell International*, 540 F.2d 1283, 1289 (6th Cir. 1976); *see also Brennan v. OSHRC (Republic Creosoting Co.)*, 501 F.2d 1196, 1198-99 (7th Cir. 1974) ("substantial deference").

However that controversy is resolved, there can be no doubt, given the express grant of rulemaking authority just quoted, that the Commission is entitled to establish *its own rules of procedure.* In promulgating Rule 100 the Commission did just that. And the judgment the Commission made as to the appropriate procedure to follow once its jurisdiction is invoked is at least entitled to the degree of deference ordinarily afforded like administrative determinations. *Cf. FCC v. Schreiber*, 381 U.S. 281, 289 (1965).[1] Thus, Rule 100 is subject to invalidation only if it is abundantly clear that Congress intended to preclude Commission review of settlements and that the Commission therefore exceeded the scope of its rulemaking authority in promulgating that Rule.

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[1] Indeed, because Rule 100 was promulgated by the Commission shortly after passage of the Act and was accepted by the Secretary at that time and for many years thereafter, there is an especially strong presumption that it falls within the Commission's rulemaking authority. *See* Pet. at 10-12.

(b) The Secretary does not, in terms, make any attempt to demonstrate that the Commission has exceeded its authority; indeed the Secretary concedes that "the Act does not expressly answer the question of employees' challenge rights once an employer withdraws its notice of contest." Br. for Fed. Resp. at 10. The Secretary does, however, advance two arguments suggesting that settlement review is inconsistent with Congress' intent; neither argument can withstand scrutiny.

The Secretary first argues that "there is no qualitative difference between the Secretary's determination to issue a citation in the first place and his decision to modify one," and that "if the Secretary's discretion is not reviewable in situations where the employer does not contest the original citation, then it should not be reviewable in situations where the employer does not contest the modified citation." Br. for Fed. Resp. at 9 n.6; *see id.* at 8, 10. But as the Secretary himself acknowledges, "the Secretary must issue a citation . . . if he believes the Act has been violated," *id.* at 9 n.6, whereas there is no statutory constraint on the Secretary's decision to "modify" a citation as part of a settlement. Thus the two types of determinations are, indeed, "qualitative[ly] differen[t]," and the fact that Congress did not provide for review of the Secretary's "probable cause" determinations in issuing citations does not mean that Congress intended to preclude review of the Secretary's decisions to settle. To the contrary, review of the latter category of decisions accords with Congress' rationale in creating the Commission: avoiding the "great potential for abuse" that would exist if the Secretary were left with unbridled discretion in enforcing the Act. *See* Pet. at 14-16.

The Secretary also argues that permitting Commission review of settlements "retards rather than advances the other policy underlying the Commission's creation—providing a very quick way of dealing with contested cases." Br. for Fed. Resp. at 9. But Congress sought speedy dis-

positions in order to "effectuate[] the basic remedial purpose of the Act—the rapid abatement of hazardous working conditions." *Id.* at 10. To the extent settlement review delays the implementation of a settlement it is only because, in a particular case, the *employees* (through their representative) have concluded that the settlement so fails to "abat[e] a hazardous condition" that it is in their interest to challenge the settlement notwithstanding any delay in implementation that may result.

The Secretary's claim that Congress, in the name of promoting worker safety, intended to preclude employees from making such a judgment is a tacit slander on the Legislative Branch. We know of no evidence to suggest that the Congress that enacted the OSH Act had so little confidence in employees—and such great confidence in the Secretary—as to deliver the employees into the Secretary's hands. Indeed, all the evidence is precisely to the contrary, for Congress went on to great pains in enacting the Act both to assure that employees would have a substantial role in the Act's enforcement and, through the Commission, to place a check on the Secretary's discretion. *See* Pet. at 14-16.

Moreover, the Secretary's professed concern over the delay that settlement review entails simply has no applicability to a whole category of cases of which the instant one is a prime illustration. Although the Secretary complains that during the pendency of Commission review here the employer was not "required to institute the abatement called for by its agreement with the Secretary," Br. for Fed. Resp. at 11 n.8, the fact is that the reason the workers challenged the settlement agreement was that the agreement did not provide for any abatement whatsoever; as the Secretary elsewhere acknowledges the settlement proceeded from the premise that when the employer completed the construction project at issue "abatement had occurred." *Id.* at 2. The only remedy provided for by the settlement was a $690 fine, and

the only effect of the challenge to the settlement was to delay the employer's obligation to pay that fine while a decision was made as to whether the absence of an abatement remedy (such as an order directing the employer to comply with the asbestos standard during future construction projects) made the settlement inconsistent with the purposes of the Act. There is simply no basis for concluding that Congress so valued speedy collection of fines as to preclude the litigation of such fundamental issues.

In sum, given the importance of the question presented to the enforcement of the OSH Act and the Secretary's failure to demonstrate that the decision below is so clearly correct as to be unworthy of this Court's attention, that question should be decided by this Court.

CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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